Supreme Court, U. S.
FILED
APR 18 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1653

W. L. WEARLY, INGERSOLL-RAND COMPANY, and THE TORRINGTON COMPANY,

Petitioners,

—v.—

FEDERAL TRADE COMMISSION, *et al.*

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOSEPH W. BURNS
MARTIN J. NEVILLE
LOVEJOY, WASSON, LUNDGREN & ASHTON
Professional Corporation
250 Park Avenue
New York, New York 10017
Telephone: (212) 697-4100

MILES W. KIRKPATRICK
CHARLES W. SMITH
MORGAN, LEWIS & BOCKIUS
1800 M. Street, N.W.
Washington, D.C. 20036
Telephone: (202) 872-5000

Attorneys for Petitioners

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

W. L. Wearly, Ingersoll-Rand Company, and The Torrington Company hereby petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case February 8, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated February 8, 1980, is not yet reported and is printed in the Appendix hereto at page 1a,[1] together with the unreported Order amending opinion (dated February 13, 1980) (App. 15a) and Order on Petition for Rehearing, Suggestion for Rehearing En Banc, and Amending Opinion dated March 20, 1980. (App. 16a-19a)

The principal opinion of the United States District Court for the District of New Jersey dated October 18, 1978, is reported at 462 F. Supp. 589, and is reprinted at App. 52a. Final judgment was entered on November 29, 1978. (App. 89a) Two subsequent opinions of the District Court (App. 93a, 110a) are unreported. The order of the Federal Trade Commission ("Commission" or "FTC") denying Petitioners' motion to quash the subpoena (App. 128a) is unreported.

JURISDICTION

The judgment of the Third Circuit was entered on February 8, 1980. The Petition for Rehearing and Suggestion for Rehearing En Banc were denied March 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

QUESTION PRESENTED

Whether under *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Toilet Goods Association, Inc.* v. *Gardner*, 387 U.S. 158 (1967); and *Gardner* v. *Toilet Goods Association, Inc.*, 387 U.S. 167 (1967), Petitioners' claims are ripe for judicial determination when a federal agency demands of an individual corporate officer, on

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[1] References to the separately bound Appendix will be "(App. ____)".

pain of criminal penalties, production of corporate documents including proprietary trade secret and confidential business, commercial and financial information, without adequate or enforceable protection against disclosure.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution, pertinent portions of Sections 6, 9 and 10 of the Federal Trade Commission Act (15 U.S.C. §§ 46, 49, 50), the Trade Secrets Act (18 U.S.C. § 1905), the judicial review provisions of the Administrative Procedure Act (5 U.S.C. §§ 701-06), the Judicial Code of the United States (28 U.S.C. §§ 1331, 1337), and the Declaratory Judgment Act (28 U.S.C. §§ 2201-01), are set forth in the Appendix. (App. 144a *et seq.*)

STATEMENT OF THE CASE

This case presents the important question of whether an individual to whom a Federal Trade Commission subpoena is addressed can obtain pre-enforcement review of a demand for production of documents containing valuable proprietary information without adequate enforceable protection against disclosure, when the FTC threatens him with criminal penalties if the documents are not produced.

Petitioner W.L. Wearly is Chairman of Petitioner Ingersoll-Rand Company, of which Petitioner, The Torrington Company, is a wholly-owned subsidiary. Respondent, Federal Trade Commission, adopted a resolution authorizing compulsory process in an investigation of activities involving Petitioners Ingersoll-Rand and Torrington. Pursuant to the FTC resolution, an FTC sub-

poena and accompanying letter, were issued to Wearly as an individual, commanding him to produce specified documents belonging to Ingersoll-Rand and Torrington, and threatening him with "the penalty imposed by law" if he failed to produce. Enclosed with the letter was a copy of the Commission's Rules of Practice, Section 2.13 (16 C.F.R. § 2.13) of which provides, in relevant part, for "criminal actions" for noncompliance with investigational process. (App. 126a) A copy of the FTC subpoena and accompanying letter to Mr. Wearly are reprinted at App. 127a, 124a. No subpoena was issued to either Ingersoll-Rand or Torrington. (91a at ¶ 8) The "penalty imposed by law" is contained in § 10 of the Federal Trade Commission Act, 15 U.S.C. § 50, (App. 146a), providing that any person who (i) neglects or refuses to produce documentary evidence in obedience to an FTC subpoena is subject to fines and imprisonment for not more than one year; and (ii) "willfully" refuses to submit documentary evidence to the FTC is subject to fines and imprisonment for up to three years.

Thereafter, Petitioners moved the FTC to quash the subpoena, urging, *inter alia*, that the FTC refused to provide adequate or enforceable assurances against disclosure of valuable proprietary information, including trade secret, confidential business, commercial and financial information demanded by the subpoena in advance of production. The Commission itself denied, in relevant part, Petitioners' motion to quash, and required that all documents be delivered to the FTC on September 12, 1977 in advance of any consideration of what protection, if any, would be provided against disclosure.[2] A copy of the

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[2] Petitioners submitted documents and information in response to 17 of the 22 Specifications of the subpoena. The dispute here relates solely to the 5 Specifications which demanded Petitioners' proprietary information.

Commission's final response of August 12, 1977 is reprinted in the Appendix (App. 128a.)

Following the FTC's denial of their motion to quash, Petitioners commenced an action in the United States District Court for the District of New Jersey, seeking declaratory and injunctive relief on the grounds, *inter alia*, that the FTC was not entitled to production of documents containing valuable proprietary information in view of the FTC's refusal to provide adequate protection against disclosure. After Petitioners had commenced their declaratory judgment action, the FTC commenced a proceeding in the United States District Court for the District of Columbia to enforce the subpoena, and obtained an enforcement order.[3]

The New Jersey District Court found that it had plenary jurisdiction under, *inter alia* the Fifth Amendment, as well as 28 U.S.C. §§ 1331 and 1337 (1976), and that the exercise of declaratory relief was proper under the *Abbott* trilogy. (App. 82a, 140a) Under an interim protective order, the court placed the disputed documentary information in *custodia legis*, and made that information available to the FTC. After a trial on the merits of Petitioners' claims for permanent judicial protection for their proprietary information, including *in camera* inspection of representative samples of the disputed documents, the New Jersey District Court issued its opinion (App. 52a) and judgment. (App. 89a)

The opinion held *inter alia*, that (i) declaratory judgment relief was proper in view of the genuine controversy

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[3] The enforcement order was later vacated by the D.C. Circuit on grounds of comity, in view of the conflict between orders of co-ordinate courts created by the enforcement action. See App. 5a at n.1.

between the parties over issues that mainly involved questions of law; (ii) the disputed documents contained proprietary information; (iii) the FTC had no right to disclose such information;[4] (iv) the FTC had no rule or regulation governing protection against disclosure of the information; (v) the FTC had not strictly honored informal agreements not to disclose;[5] and (vi) Wearly was entitled to a protective order because the FTC demanded that the documents be produced before any assurance of protection would even be considered, thus exposing the proprietary information in dispute to destruction through disclosure by the FTC. The District Court thereupon issued a final protective order that continued to make the disputed documents available to the FTC but protected them against improper disclosure. (App. 92a)

On appeal from the judgment and order of the District Court, the Third Circuit found that the evidence introduced in the District Court demonstrated that the FTC had made inappropriate disclosure of proprietary information, and agreed with the District Court that such governmental behavior "simply cannot be countenanced." (App. 7a) The Court of Appeals held, however, that the

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[4] In a subsequent opinion denying the FTC's motion to vacate the judgment, the court, having considered this Court's decision in Chrysler Corp. v. Brown, 441 U.S. 281 (1979), ruled that "[b]oth 18 U.S.C. § 1905 and 15 U.S.C. § 46(f) forbid disclosure of the contested documents." (App. 113a)

[5] The record in this case contains an example in which Petitioner Torrington submitted proprietary shipment data, pursuant to and in reliance upon an Administrative Law Judge's protective order entered in a different matter and calling for 15 days' advance notice of disclosure. The information was published by the Commission *without notice*. (App. 99a-100a) The District Court found that "[t]his sample, by itself, is enough to show that disclosure to the Commission, even under formal rules not available for a nonpublic investigation, entails too great a risk and requires judicial protection." (App. 100a)

District Court lacked jurisdiction to entertain Petitioners' pre-enforcement declaratory judgment action, on the grounds that Petitioners did not satisfy either the "finality" or "hardship" requirements for pre-enforcement review of agency action set out by this Court in the *Abbott* "trilogy", *supra*.

Specifically, the Court of Appeals held that the FTC had not, at the time of the pre-enforcement action, taken a position "on which documents should be subject to what type of confidential treatment," (App. 12a-13a) and that Petitioner Wearly was under no compulsion either to turn over the documents or suffer criminal sanctions, but could await an enforcement proceeding by the FTC, at which time he could interpose all the objections to the subpoena, which he presented to the District Court in the pre-enforcement action, citing *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari for the following reasons:

First, the question raised in this Petition is of "general importance . . . in the administration of the investigatory provisions of the Federal Trade Commission Act." *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 212-13 (1961). The question is critical and recurring,[6] and must be faced daily by persons subpoenaed by government

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[6] *See, e.g.*, Anheuser-Busch, Inc. v. F.T.C., 359 F.2d 487 (8th Cir. 1966) (both company and individual subpoenaed). *See also*, American Motors Corp. v. F.T.C., 601 F.2d 1329 (6th Cir. 1979), *cert. denied*, ___ U.S. ___ 48 U.S.L.W. 3309 (No. 79-306 Nov. 5, 1979); Atlantic Richfield Co. v. F.T.C., 546 F.2d 646 (5th Cir. 1977); First Nat'l. City Bank v. F.T.C., 538 F.2d 937 (2d Cir. 1976) (subpoenas issued to companies).

agencies which operate under statutes similar, in relevant respects, to the Federal Trade Commission Act (hereafter "FTC Act"), who are required to submit proprietary information to government agencies.[7]

Second, the Court of Appeals' decision will effectively eviscerate this Court's holding in *Abbott*, *supra*, that the " 'finality' element" in determining when agency action is ripe for review must be interpreted "in a pragmatic way." 387 U.S. at 149. This Court has reaffirmed its adherence to the *Abbott* policy. *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

The FTC's position that it would not even consider providing any protection against disclosure of the proprietary information of Ingersoll-Rand and Torrington prior to production was, by any standard, final: (i) Petitioners' motion to quash on the ground that the FTC provided no protection against disclosure was denied by the FTC; (ii) before the District Court in New Jersey entered its opinion and final protective order the FTC had sought and obtained an enforcement order in another district

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[7] The importance of this question is confirmed by the broad range of businesses who appeared as amici curiae in the Third Circuit. (App. 21a-34a; 35a-51a). In addition to the Chamber of Commerce of the United States and the National Association of Manufacturers, the following associations and corporations appeared below:

Chemical Specialty Manufacturers Association, American Telephone and Telegraph Company, Burlington Industries, Inc., Chemical Manufacturing Association, (formerly Manufacturing Chemist Association), the Dow Chemical Company, Dow Corning Corporation, E.I. DuPont De Nemours & Company, Eli Lilly and Company, General Instrument Corporation, Life Savers, Inc., Monsanto Company, PPG Industries, Inc., Rilsan Corporation, Stauffer Chemical Company, Union Carbide Corporation, U.S. Steel Corporation, Amax, Bethlehem Steel Corp., Electronic Industries Association, Hughes Aircraft, and Wards Cove Packing Company, Inc.

court,[8] and (iii) the FTC adamantly had refused even to look at the documents made available to it under the protective orders of the New Jersey District Court.

As in *Abbott*, the FTC's action in denying the motion to quash and ordering production without protection against disclosure had "reached its complete development"; was "quite clearly definitive"; was not "informal" or "tentative"; and "compliance was expected". 387 U.S. at 150-51. Also as in *Abbott*, judicial resolution of the adequacy of FTC confidentiality procedures would not entangle the courts "in abstract disagreements over administrative policies": the agency's decision in this case had "been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

The evisceration of this Court's holding in *Abbott* as to the "finality" of agency action resulting from the decision of the Court of Appeals applies not only to the case at bar, but also to other respondents to FTC subpoenas because the FTC's position in this case reflects its general policy in administering the FTC Act.

Third, it is respectfully submitted that denial to Petitioners of access to the courts, as the Court of Appeals and other courts[9] have done, on the ground that no "hardship" exists when refusal to comply is based upon a "good faith" challenge, fails to recognize the vagueness, uncertainty, and subjective nature of the "good faith" standard.

In *Reisman* v. *Caplin*, *supra*, this Court considered a pre-enforcement action brought by an individual served with an Internal Revenue Service summons under statu-

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[8] *See* n.3 *supra*.

[9] *See* n.6 *supra*.

tory provisions that have been held to be *in pari materia* with those provisions of the FTC Act in issue here,[10] and held that because a "good faith" challenge to the subpoena protected against imposition of pre-enforcement penalties, the respondent could safely await an enforcement proceeding to assert his objections. 375 U.S. 447-49. The Court gave some examples of what it would apparently consider good faith challenges (objection to lack of protection against disclosure of proprietary information is not among them), apparently contrasted "good faith" challenge to "default" or "contumacious" refusal to comply, but did not otherwise attempt to define "good faith." *Id.*

Petitioner Wearly respectfuly submits that this Court's opinion in *Reisman* does not remove him from "the very real dilemma", *Abbott*, *supra*, 387 U.S. at 153, in which he was put when confronted by the choice of submitting his company's proprietary information to the FTC without protection against destruction through disclosure, or risking criminal penalties if he refused, as may briefly be illustrated by the following:

a. In *St. Regis Paper Co.*, *supra*, St. Regis received an FTC order that commanded production, *inter alia*, of copies of reports that the company had made to the Census Bureau. The company refused to supply the reports on the ground that the FTC had no legal authority to obtain documents the confidentiality of which was protected by statute. 368 U.S. at 215. This Court upheld the imposition of pre-enforcement penalties against the company for withholding the reports from the FTC. 368 U.S. at 226-27. The majority opinion, agreed with the Second Circuit, *United States* v. *St. Regis Paper Co.*, 285 F.2d 607, 614

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[10] Anheuser-Busch, *supra* n.6, 359 F.2d at 490.

(2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961), which held that St. Regis' refusal to submit the reports based on "a wrong guess on a disputed issue of law" was not a "good faith" defense to the imposition of penalties. *See*, 368 U.S. at 224. Mr. Justice Black, Mr Justice Whittaker, and Mr. Justice Stewart believed, *per contra*, that "there was a serious, good-faith controversy concerning the Commission's power to compel disclosure." 368 U.S. at 230 (dissenting opinion).

b. The majority in *St. Regis* further held that the company was remiss in not seeking relief, for example under the Administrative Procedure Act or Declaratory Judgment Act, once the FTC issued a notice triggering statutory penalties after thirty days of default. 368 U.S. at 226. Although it is true that default notice procedures do not apply to an FTC subpoena, the FTC's final decision denying Petitioners' motion to quash directed that the disputed documents be produced thirty days thereafter. (App. 134a) To contend that no pre-enforcement penalties may be imposed for a "good-faith" challenge to a subpoena is to put the "rabbit in the hat" because that question turns on whether a court or jury agrees the respondent refused in good faith to comply with the subpoena. A "wrong guess on a disputed issue of law", even when based on good faith belief, can be, as this Court noted in *Abbott*, "even more costly" than compliance.[11] (387 U.S. at 153).

c. Further indicative of the uncertainty that a good faith refusal to comply with the demands of an FTC subpoena is a defense to pre-enforcement penalties under

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[11] The New Jersey District Court similarly noted that the weakness in the "good faith" standard is that good faith is subjective, not objective. (App. 136a-137a)

§ 10 of the FTC Act is the Senate Report accompanying pending legislation to amend the FTC Act, which states:

> Section 6 [amending § 10] eliminates the threat of criminal sanctions applied to those recipients of a Commission subpena *who in good faith resist* Commission subpenas by making such sanctions inapplicable prior to a judicial order of enforcement. This is similar to the procedures applicable to the enforcement of the subpenas of several other administrative agencies, and it accords the persons who are subjected to a broad investigatory subpena a *reasonable opportunity to obtain judicial review of its legality*. (emphasis supplied). [S. Rep. No. 96-500, 96th Cong., 1st Sess., at 15-16.] (App. 141a-142a; *see also*, 143a)

In view of the foregoing, Petitioners respectfully submit that the *in terrorem* effect of the FTC subpoena issued to Wearly, as an individual, was to put him "in a dilemma that it was the purpose of the Declaratory Judgment Act to ameliorate", *Abbott*, *supra*, 387 U.S. at 152 (footnote omitted): either submit his company's documents and risk destruction of their value through disclosure, or withhold them, await an enforcement action, and take the risk, on pain of criminal penalties, that a court or jury will agree with his belief that his refusal to comply was based on a good faith challenge to the subpoena.

The District Court ruled on the facts and the law that Wearly's fear that he would be in jeopardy of criminal prosecution for refusing to produce the documents was real.[12] In *Abbott*, this Court ruled that the existence of

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[12] On October 19, 1977 the District Court stated:

> In particular, Wearly claims to be in jeopardy of criminal prosecution under 15 U.S. Code section 50, first paragraph; a risk that

statutory criminal sanctions is the governing criteria for pre-enforcement jurisdiction, holding that a subsequent representation by the Department of Justice that it would proceed civilly rather than criminally "should not suffice to defeat" the pre-enforcement action. 387 U.S. at 154.

Petitioners submit that forcing an individual to make such a choice creates the requisite "hardship to the parties of withholding court consideration", *Abbott*, *supra*, 387 U.S. at 149.[13] Petitioners further submit that this Court's opinion in *Reisman* has been erroneously relied upon by the Court of Appeals and other courts[14] in improperly denying to Petitioners, and others similarly situated, access to the courts, contrary to this Court's later decision and policy in *Abbott*, *supra*.

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the parties seem to agree would not apply if the subpoena had been directed to IR.

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FTC argues, among other things, that no criminal prosecution appears to have been made under 15 U.S. Code Section 50, but it is understandable that Mr. Wearly prefers not to be the first to be so charged.

For him the impact in that case would be 100 percent. (App. 139a)

[13] At the first hearing in New Jersey, the Court stated:

It has been said where there is a dispute, particularly between citizens and Government agencies, the civilized technique is not to have that confrontation but to use the declaratory judgment and get it answered first. (App. 138a)

[14] *See* n.6 *supra*.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH W. BURNS
MARTIN J. NEVILLE
MILES W. KIRKPATRICK
CHARLES W. SMITH

Attorneys for Petitioners

April 18, 1980